IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.893 OF 1996.

Chandermal Matumal Chandwani : Appellant.

versus

Sharif Sikandar Bobde & ors. : Respondents.

Ms.A.S.Prabhu i/by N.V.Bandiwadekar for the appellant.

Mr.Karale h/f Mr.P.K.Dhakephalkar for the respondents.

CORAM : D.G.DESHPANDE,J.

DATED : 15th March 2005.

ORAL ORDER

1. This appeal is filed by the original plaintiff against the dismissal of his suit by the IInd Joint Civil Judge, Senior Division, Thane by its judgment and order dated 29th July 1995. The suit of the plaintiff was for removal of encroachment on his plot by the defendants and for damages. The plaintiff adduced oral as well as documentary evidence. But the suit came to be

dismissed for three reasons by the trial Court.

. That the plaintiff admitted in the cross examination that he has sold the land to one Manoj and his brother and they have constructed a building thereon. But the plaintiff did not prove the sale deed in that regard and did not join either Manoj or his brother as a party. Therefore, according to the trial Court, there was nothing on record to hold that the plaintiff was still owner of the encroached portion.

. Secondly, according to the trial Court, even though the plaintiff produced map prepared by surveyor, but no attempt was made to examine the surveyor and prove the contents of the map. Therefore, the trial Court found that merely proving the document and exhibiting the same is not a proof of its contents.

. Thirdly, in para 9 of the impugned judgment, the trial Court held that the defendants had, after converting the land to non-agricultural use and constructing a cinema house, given a public notice inviting the people to raise objections. But the plaintiff did not

raise any objection at that time and, even if, according to the plaintiff, the defendants had encroached upon the land in the year 1984, the plaintiff did not file suit till 1987.

2. Out of three reasons given, only second reasoning given by the trial Court about non-examination of the surveyor can be said to be proper reasoning. So far as third reasoning is concerned, i.e. not raising objection by the plaintiff to the construction of cinema house cannot be construed as an admission on the part of the plaintiff that the encroached land belonged to the defendants. The plaintiff had given notice in respect of encroachment to which the defendants have given reply. The dispute was still pending.

3. Similarly non-examination of subsequent transferees, i.e. Manoj or his brother, cannot also come in the way of the plaintiff in proving his case. It is however equally true that in a case of encroachment of this type the plaintiff should have examined the District Inspector of Land Records (DILR) or the officers from the Revenue Department who measured the land and

prepared map. Admittedly, the plaintiff has not examined surveyor. The encroached area is 285 sq.mtrs. Therefore, in the circumstances this is a fit case for remand. Hence I pass the following order :-

:ORDER:

Appeal is allowed.

The order of dismissal of the suit is set aside. The matter is remanded to the trial Court where both the sides will have right to adduce evidence viz.calling upon the surveyor to prove the map and other evidence as the parties may think it proper in the circumstances of the case.

The trial Court to decide the suit afresh on the basis of evidence already on record and that may be further tendered before the Court and trial to be completed within six months from the date of receipt of this order.

Appeal is disposed of accordingly.

[D.G.DESHPANDE]

15/03/2005 JUDGE.